SUBJECT INDEX

PAGE

The decision below is based upon the particular facts of this case 1

The Court of Appeals correctly applied the provisions of the Act in the light of principles of construction established by this court 4

DARK PAGE BLEEDTHRU

TABLE OF AUTHORITIES CITED

CASES

	PAGE
Bartels v. Birmingham, 332 U. S. 126	4
Fishgold v. Sullivan Drydock & Repair Corp., 328 U. S. 275	4
Lee v. Remington-Rand, 68 Fed. Supp. 837	2
Levine v. Berman, 167 F. 2d 386; cert. den., 332 U. S. 792	2
Loeb v. Kivo, 169 F. 2d 346; cert. den., 335 U. S. 891	2
National Labor Relations Board v. Hearst Publications, 322 U. S. 111	4
Rutherford Food Corp. v. McComb, 331 U. S. 722	4
United States v. Silk, 331 U. S. 704	4, 5
Williams v. Dodds, 163 F. 2d 724	2

STATUTES

Universal Military Training and Service Act of 1948, amended 1951 (50 U. S. C. A., App. Sec. 459)	4

IN THE

Supreme Court of the United States

October Term, 1951
No. 599.

LIONEL H. SANGER,

Petitioner,

vs.

THE PLOMB TOOL COMPANY, a corporation,

Respondent.

Respondent's Reply to Memorandum for the United States as Amicus Curiae.

The Decision Below Is Based Upon the Particular Facts of This Case.

There is no support whatever for *amicus curiae's* opening statement that "under the decision below, manufacturers' representatives and traveling salesmen working on a commission basis are denied . . . re-employment benefits" under the Selective Service Act. [A. C. Memo, p. 1.] Manifestly, the Court of Appeals' decision is limited to this particular manufacturers' representative paid by commissions where the other and controlling facts are as set out in Respondent's Brief in Opposition [pp. 2-8] and as summarized below.

DARK PAGE BLEEDTHRU

Likewise unwarranted is *amicus curiae's* conclusion that the decision would exclude from the protection of the Act the large numbers of persons shown by census figures to be engaged as "traveling salesmen and sales agents," "insurance agents and brokers," "canvassers and solicitors." [A. C. Memo, pp. 1, 2, 3; *cf.*, Petition, p. 9.] *Amicus curiae* jumps to that conclusion without any information concerning "the circumstances of the whole activity" surrounding any individual engaged in the listed occupations [which *amicus curiae* contends is critical; see A. C. Memo. pp. 3-4] and even without a showing that the supposedly affected individuals are paid by commissions [a point which *amicus curiae* seems to regard as governing the decision below].

Amicus curiae, like petitioner, seeks to over-generalize the question here presented and to exaggerate its purported importance by obscuring the plain fact that the commission basis of compensation was in no way determinative of the issue in the Court of Appeals* and that there are numerous salient facts which differentiate petitioner from the vast majority of commission salesmen.

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*The Court of Appeals for the Ninth Circuit has itself recognized that a commission salesman may, in an otherwise proper case, be entitled to reinstatement. See *Williams v. Dodds* (9 Cir., 1947), 163 F. 2d 724, citing with apparent approval *Lee v. Remington-Rand* (S. D. Calif., 1946), 68 Fed. Supp. 837. Similarly, commission salesmen were reinstated where the other facts showed that they were not independent contractors in *Loeb v. Kivo* (2 Cir., 1948), 169 F. 2d 346, cert. den. 335 U. S. 891; *Levine v. Berman* (7 Cir., 1947), 167 F. 2d 386, cert. den. 332 U. S. 792.

Petitioner was actually in business for himself. As a manufacturers' representative "Serving the Automotive and Industrial Jobber" [according to his own business stationery; see Ex. H, R. 88-84], he sold the products of seven different companies. [Pre-trial Stip., Ex. 50; App. A. to Resp. Br. par. 6(b).] While he did not market their products as a distributor who buys and resells [*cf.*, A. C. Memo. p. 4], petitioner did assume the risk of selling enough products to produce sufficient commissions to cover his expenses [averaging $200 weekly during 1941 and 1942 and including depreciation and upkeep on his automobile, salary of his assistant, meals and lodging on business trips, business entertainment and stationery and supplies; see Exs. J and K, R. 89-91], and yield him adequate compensation for his time and effort. His profit or loss was dependent upon his own initiative, judgment and energy, in determining the magnitude and scope of his operations, in choosing his customers, in planning his selling activities and in directing his efforts, matters which were left entirely to his own determination. [Pre-trial Stip., Ex. 50, App. A to Resp. Br., par. 6(c).]

It was on the basis of these and the other particular facts involved that the Court of Appeals held that petitioner had not left a "position . . . in the employ of any employer" within the meaning of the Selective Service Act.

The Court of Appeals Correctly Applied the Provisions of the Act in the Light of Principles of Construction Established by This Court.

The Court of Appeals did not ignore the rule of liberal construction of the Selective Service Act set forth in *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U. S. 275, nor does the decision frustrate the policy of the Act. In conferring reemployment rights only upon those who left "a position . . . in the employ of any employer," Congress wisely recognized the impracticability of guaranteeing to every returning veteran the reestablishment of all his pre-war business relationships. As pointed out in Respondent's Brief in Opposition [p. 16], every court which has considered the question has interpreted the statutory language as excluding independent contractors from its coverage. And this course of judicial decision dating from 1944 has received Congressional approval through the reenactment of the reinstatement provisions without change in the Universal Military Training and Service Act of 1948 [as amended in 1951, 50 U. S. C. A., App. Sec. 459].

The Court of Appeals not only followed this established construction of the Act, but it also correctly applied the principles established by this Court for determining employment relationships under remedial social legislation in such cases as *National Labor Relations Board v. Hearst Publications*, 322 U. S. 111; *United States v. Silk*, 331 U. S. 704; *Rutherford Food Corp. v. McComb*, 331 U. S. 722, and *Bartels v. Birmingham*, 332 U. S. 126.

The striking similarity between the facts of this case and the facts which led this Court in *United States v. Silk* to hold that the truck driver-owners there were independent contractors, demonstrates the fallacy in *amicus curiae's*

contention that the Court of Appeals has misconceived the pronouncements of this Court. [See A. C. Memo, p. 2.] In the *Silk* case the truck drivers owned their own trucks; petitioner owned his own Cadillac. The truck drivers hired their own helpers; so did petitioner. In one instance the truck drivers hauled coal for a single business and in the other for any customer, a distinction which this Court characterized as important though not controlling [331 U. S. at 719]; petitioner represented seven manufacturers and was free to represent anyone. In addition, this Court recognized in the *Silk* case that the degree of control exercised was a part of the total situation to be considered [331 U. S. at 719] just as did the Court of Appeals in its opinion below. [R. 245.] Like the truck driver-owners, petitioner was an independent business man, taking the risk of loss and enjoying the opportunity for profit from sound management.

The Court of Appeals not only "purported" to follow the principles established by this Court [*cf.*, A. C. Memo, p. 2], but actually measured the total factual situation in the instant case against the criteria laid down in the *Silk* case and reached, on similar facts, a conclusion entirely in accord with this Court's holding that the truck drivers there were independent contractors. Neither the opinion of the Court of Appeals nor its actual decision gives any indication of the application of what *amicus curiae* calls "formulary, fine-spun distinctions, discountenanced by this Court" [A. C. Memo, p. 2] nor of reliance upon local state law or anything other than Federal decisions. [*Cf.*, A. C. Memo, p. 3.]

An application of the "economic reality" test confirms the correctness of the conclusion reached by the Court of Appeals. As pointed out in Respondent's Brief in Op-

position [p. 17], petitioner was not dependent for his livelihood upon respondent, for not only did he derive more than 43% of his pre-war income from other sources, but after he returned from service, he earned substantially more in 1946 and 1947 from his other pre-war lines, excluding that of respondent, than he had earned from respondent plus the others in 1941 and 1942.

The most eloquent testimony showing petitioner's independent status and lack of dependence upon respondent for his livelihood as a matter of economic reality is found in the fact that upon his return from the service he refused respondent's offer of a position as a full-time employee which would have paid him approximately $39,500 during 1946. [Exs. 48, 49; R. 111, 206, 210.] Instead, he insisted upon continuing his own business of acting for numerous manufacturers. [R. 122-124, 129, 133, 148, 186-187, 211.] In short, he refused to become an employee and insisted upon renewal of his status as an independent contractor, a matter beyond the scope of the Selective Service Act.

Respectfully submitted,

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